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No. 90-465

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1990

THE STATE OF WASHINGTON,

Cross-Petitioner,

v.

ASSOCIATED GROCERS, INC.,

Cross-Respondent.

ON CROSS-PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

CROSS-PETITIONER'S REPLY MEMORANDUM

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Associated Grocers' brief in opposition on cross-petition in No. 90-465 tries to rewrite the Washington Supreme Court opinion in this case to correspond to the proper rational basis test set forth by the State in its cross-

petition. Associated Grocers suggests for the first time in the opposing brief that the Washington Supreme Court really meant to engage in rational basis analysis in reaching its equal protection holding in this matter. While Associated Grocers' response acknowledges the propriety of the rational basis test advocated by the State, the record rebuts Associated Grocers' suggestion that the court used the proper rational basis test. Associated Grocers' improper effort to speculate about the state court's motives fails because it blatantly ignores what the court actually did.

In fact, both the trial court and the supreme court used the first prong of a three-part equal protection test[1] to conclude that the statute created only one class of taxpayers, consisting of retailers and wholesalers,[2] and that treating the two groups differently thus resulted in an equal protection violation.[3] To avoid the arguments in the cross-petition, Associated Grocers now tries to rewrite the state court decision to ignore the unmistakable language in the opinion limiting the court's analysis to the "single-class" inquiry:

> Where, as here, there is but one class, and the members of it are taxed differently, the statute must be declared unconstitutional. It is not necessary to consider the second and third inquiries under the *Yakima County* test.

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[1]The test used by the state court is enunciated in *Yakima County Deputy Sheriffs' Ass'n v. Board of Commissioners*, 92 Wash. 2d 831, 835-36, 601 P.2d 936 (1979), *appeal dismissed*, 446 U.S. 979 (1980). (Cross-Pet. p. 6)

[2]Associated Grocers alleges that the State is confusing matters by referring to internal distributors as retailers and by discussing the business and occupation tax on retailers in Wash. Rev. Code § 82.04.250. This criticism is unfounded because by definition all internal distributors are retailers distributing goods to two or more of their own retail outlets. Wash. Rev. Code § 82.04.270(2).

[3]Cross-respondent refers to competition between Safeway and Associated Grocers. (Brief in Oppos. p. 3) Since Associated Grocers is exclusively a wholesaler and Safeway makes no wholesale sales, no direct competition exists at the wholesale level. Any competition is between Safeway and the retail outlets purchasing from Associated Grocers. The issue of competition, however, is a diversion in the case because competition is not a relevant factor in evaluating whether a partial tax exemption violates the constitution. *See Pittsburgh. v. Alco Parking Corp.*, 417 U.S. 369, 376 (1974).

Associated Grocers, Inc. v. State of Washington, 114 Wash. 2d 182, 188, 787 P.2d 22 (1990). After specifically refusing to apply the proper rational basis test (the third prong of the Washington Supreme Court's equal protection test), the court moved directly to its discussion of remedies. The court's explicit refusal to consider whether the partial exemption satisfied the rational basis test was clear error. The State's cross-petition is based upon this error.

By seeking to recast the court's opinion as a form of rational basis inquiry, Associated Grocers in effect concedes that the court's "single class" equal protection analysis was improper. In fact, Associated Grocers acknowledges the rational basis test of this Court, citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 (1981). (Brief in Oppos. p. 5)[4]

While even Associated Grocers has now abandoned the flawed three-part *Yakima County* equal protection test, the Washington Supreme Court unfortunately has not. Despite Associated Grocers' efforts to suggest that the court *meant* to engage in some type of rational basis analysis, the court's words plainly belie any such intent. Associated Grocers' ineffectual attempt to rewrite the state court opinion to meet the rational basis test simply highlights the critical flaw in the court's decision that the cross-petition seeks to remedy.

Contrary to the speculation of Associated Grocers, there is no evidence that the Washington Supreme Court majority would have reached the same result using a proper rational basis analysis. Proper minimal scrutiny would

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[4]Associated Grocers' later reference to *Allegheny Pittsburgh Coal Co. v. County Comm'rs*, 488 U. S. 336, 345 (1989) (Brief in Oppos. pp. 6-7) as support for a "single class" analysis under this Court's precedents is misplaced. *Allegheny* addressed only discriminatory *application* of a single tax classification. It did not deal with the legislative power to classify taxpayers which is at issue in the present case.

involve examination of any conceivable purpose supporting the legislative classification.[5]

The record, however, does reveal that when the dissenting justices in this case employed a proper rational basis analysis, they found a legitimate purpose supporting the exemption as written. (*Associated Grocers*, 114 Wash. 2d at 195-97, Pet. 16a) This demonstrates that the Washington Supreme Court likely would have reached a different result if it had applied a proper equal protection analysis.

Far from being a minor squabble over a state tax scheme, as Associated Grocers would like to characterize this matter, the State of Washington's cross-petition raises an important federal constitutional issue. By declaring a statutory classification unconstitutional without considering any rational basis for the classification, the Washington Supreme Court committed a fundamental error in equal protection analysis. This error must be corrected not only to reverse the result in this case but also to avoid additional erroneous decisions in the future.

CONCLUSION

The State has demonstrated that any legitimate equal protection analysis must include a rational basis inquiry. The cross-respondent has acknowledged this standard by arguing that the Washington Supreme Court's opinion actually *meant* to engage in such a rational basis inquiry. Since the court's opinion unmistakably contradicts that assertion, the State asks that its cross-petition for certiorari be granted. The Court may wish to consider

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[5]The suggestion by Associated Grocers that only the enunciated purpose can be considered is not supported by authority. (Brief in Oppos. p. 7) In fact, minimal scrutiny properly involves examination of any rational basis for the classification, whether enunciated or not. *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 462-63 (1988); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *United States Dep't of Agriculture v. Moreno*, 413 U.S. 527, 534 (1973).

summary disposition of the matter, including remand to the Washington Supreme Court for reconsideration of the equal protection issue.

DATED this 25th day of October, 1990.

Respectfully submitted,

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